IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 2ND FEBRUARY 2007 / 13TH MAGHA 1928

CRL .A.No. 1454 of 2006(C)

SC.439/2004 ON THE FILE OF THE COURT OF THE ADDL.SESSIONS JUDGE (ADHOC-I), ERNAKULAM
CP.6/2001 of JUDL.MAGISTRATE OF FIRST CLASS, PERUMBAVOOR

APPELLANT: ACCUSED

GARVASIS @ JIMMY JOHN, S/O. AUGUSTHY,
C.NO.2939, CENTRAL PRISON, KANNUR.

BY ADV. ADV.LIJU V STEPHAN(STATE BRIEF)

RESPONDENT: COMPLAINANT

STATE OF KERALA, REPRESENTED BY
C.I. OF POLICE, PERUMBAVOOR POLICE STATION.

BY PUBLIC PROSECUTOR SRI. S.DILEEP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 1454 of 2006

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Dated this the 2nd day of February, 2006

JUDMENT

The appellant, accused in S.C. No.439/2004 on the file of the Court of the Additional Sessions Judge (Adhoc-I), Ernakulam, faced trial for the offences punishable under sections 376 IPC. The prosecution case against the appellant is that the appellant committed rape on PW1 on 10-6-1998, 11-6-1998 at the residence of PW11 and on 13-6-1998 near house No.XV/108 adjacent to the K.S.R.T.C. Bus Stand, Perumbavoor and thereby committed the offence punishable under section 376 IPC. To prove the charge against the appellant, the prosecution examined PW1 to PW11 and Exts.P1 to P12 were marked. Material object MO1 to MO4 were also marked. When the appellant was questioned under section 313 of Cr.P.C., he admitted that he had sexual intercourse with her, but added that he never threatened her and that was with her consent. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 376 IPC and he was convicted thereunder and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/- and in default to undergo simple imprisonment for one year under section 376 IPC. The benefit under section 428 Cr.P.C. was granted.

The above conviction and sentence awarded against the appellant are assailed in this appeal.

2. Since the appellant is in jail, the appeal has been filed by him through the jail authorities. As the appellant has not defended his case by his own counsel, State Brief was appointed to defend the case of the appellant.

3. This Court heard learned counsel for the appellant as well as the learned Public Prosecutor.

4. The learned counsel for the appellant contends that the trial court went wrong in accepting the prosecution case to find the appellant guilty of the charges levelled against him. The learned counsel also contends that the evidences adduced by the prosecution are contradictory in nature. It is further contended that the trial court ought to have considered the case set up by the appellant while he was questioned under section 313 Cr.P.C. that he had sexual intercourse with PW1 with her own consent. Lastly, it is contended that the sentence awarded against the appellant is excessive.

5. The prosecution case is that PW1, a student of B.A. Degree course aged 19 years, left the house in a frustrated manner and went to Sarvodaya Santhi Bhavan on 9-6-1998 and met PW3 for shelter and

also for employment. PW3 informed PW1 that there was no female inmates in the institution and he advised her to go over to Love Home, Thodupuzha wherein female inmates were there. PW3 consulted the matter with the appellant and the appellant informed him that he was acquainted with the Love Home and he would take her to the Love Home. So, PW3 entrusted a letter addressed to the Director of Love Home and Rs.100/- with the appellant and he sent PW1 along with the appellant with direction to the appellant to entrust her with the Director of Love Home at Thodupuza. But, the appellant took her to the residence of PW11 at Ootty and when they stayed there on 10-6-1998 and 11-6-1998, he committed rape on her without her consent and on 12-6-1998 the above fact was revealed by PW1 to PW11, they were sent back. It is also alleged that when PW1 and the appellant reached Perumbavoor K.S.R.T.C. bus stand at night, the appellant committed rape on her and when PW9, the A.S.I. of Police, Perumbavoor came over to the bus stand at 2.00 A.M. in connection with his night patrol duty, the matter was informed to him by PW1. Hence, the appellant was arrested and a case was registered against him. Thereafter, the investigation of the case had been conducted by PW9 and PW10 and finally a charge was filed against the appellant. To prove the case

against the appellant, the court below mainly relied on the evidence of PW1 to PW4 and PW9 and PW10. PW1, who was the victim, stated that she left the house of her uncle, where she was residing study purpose, and as she came to know about the functioning of Sarvodaya Santhi Bhavan, she met PW3 for getting an employment. She further stated that PW3 informed her that there was no female inmates in the institution and he advised her to go to Love Home wherein female inmates are admitted. This witness stated that PW3 sent her along with the appellant with a direction to the appellant to entrust her with the Director of the Love Home. But the appellant took her to the residence of PW11 at Ootty and when they stayed there on 10-6-1998 and 11-6-1998, the appellant committed rape on her without her consent. She further stated that though she resisted, she was threatened by the appellant by stating that he was a murderer and had undergone imprisonment and he had shown some weapon like knife. She stated that in the residence of PW11 the appellant introduced her as his lover. When she narrated the entire story to PW11, they were sent back and when they reached Perumbavoor K.S.R.T.C. bus stand at night, the appellant again committed rape on her. When PW9, the A.S.I. of Police, Perumbavoor came over to the bus stand at 2.00 A.M. in

connection with his night patrol duty, the matter was informed to him. She identified the dresses which she worn on 13-6-1998. She also stated that she was examined by PW4 doctor at the request of the police. The evidence of this witness is supported by PW3 who was conducting Survodaya Santhi Bhavan Charitable Trust. He deposed that on 9-6-1998 PW1 came to the Santhi Bhavan and requested for shelter in the institution. He also deposed that since there was no lady inmates in the institution, he decided to send PW1 to Love Home and he had given Ext.P2 letter addressed to the Director of Love Home. By this time the appellant came there and heard the entire matter and he informed that he knew the Love Home and agreed to take PW1 to Love Home. So, he gave Rs.100/-, Ext.P2 letter and ext.P3 dip containing the address of the Love Home and sent PW1 along with the appellant. He stated that he contacted the Love Home and understood that they did not reach there and he received the information from the newspapers and he went over to the police station, Perumbavoor and found the appellant and PW1 at the Police Station. The court also considered the evidence of PW4 who examined PW1 and issued Ext.P4 medical certificate. She stated that PW1 was subjected to sexual intercourse. But she stated that there was no external injuries. The statement recorded by PW4 would also show

that PW1 was raped on previous day. PW9 and PW10 are police officials who conducted the investigation of the case. PW9 A.S.I. who recorded Ext.P1 statement from PW1 conducted the investigation of the case and filed final charge against the appellant. PW9 stated that he recorded Ext.P1 statement of PW1 and she was sent for medical examination. PW10 was the Head Constable. He stated that he went to Neelgiri at Edakkatti Village and he prepared Ext.P11 mahazar. PW11 stated that he was a friend of the appellant and he had acquaintance with him at Muringoor in connection with a religious function. He stated that both the appellant and PW1 came to his house on 10-6-1998 and the appellant introduced PW1 as his wife and he allow them to live in his house. He also stated that he was the Councillor of Vikutty Panchayat and while the panchayat was going on, PW1 informed him that the appellant cheated her, she was not his wife and the appellant brought her stating that he was taking her to some orphanage and raped her. PW2, father of PW1, had stated before the court that PW1 was residing his house and she was studying at the college during the relevant time and she was missed on 9-6-1998. He further stated that no complaint was filed before the police about the missing of PW1. The trial court after considering the evidence came to the conclusion that “

thus the deposition of PW1 taken along with the evidence of PW4, Ext.P4 and the report of the chemical analysis, Ext.P12 coupled with the defence of the accused unerringly lead to the irresistible conclusion that the accused had sexual intercourse with PW1".

6. The submission of the learned senior counsel is that during the stay at Neelgiri there were many chances for PW1 to reveal all these facts to the public and to escape from the clutches of the appellant and hence the conclusion arrived at by the trial court that the appellant committed rape PW1 without her consent is not sustainable.

7. The fact that PW1 went to the institution of PW3 on 9-6-1998 for shelter and since no female inmates would be allowed in the institution, PW3 advised her to go to Love Home wherein female members were also permissible and she was entrusted with the appellant to get her admitted at Love Home. She was accompanying the appellant with firm belief that the appellant will get her admitted in some orphanage or some institution. But, the appellant took PW1 to the residence of PW11 at Neelagiri and at the residence of PW11. The evidence of PW4 would show that PW1 was subjected to intercourse. After taken into consideration the incriminating circumstances and the dictum laid down by the Apex Court in a decision reported in State of

U.P. V. Lakshmi (AIR 1988 scene of occurrence 1007) and legal maxim the trial court came to the conclusion that "**in the absence of injury it cannot be concluded that the incident had not taken place or that sexual intercourse was committed with the consent of the prosecutrix".** The state of mind of PW1 has also to be considered. PW1 left the house in a frustrated stage and she was at the verge of committing suicide. She was accompanying the appellant with firm belief that the appellant will help her. The evidence of PW1 would show that she along with the appellant reached in the residence of PW11 early in the morning on 10-6-1998. When she was asked as to why she has not raised any cry, she deposed that though she raised the cry, the others may not be able to identify it because of language problem or because they were not aware of the presence of PW1 and the appellant at the house. In cross-examination she stated that she was in a strange place far away from the residence and that too in Tamil Nadu and she could not escape by running away since she did not know any place in the residence of PW11, which was situated almost on the top of a hill. In the above circumstances, it can be concluded that PW1 was in a frustrated, dejected and helpless and on account of such state of mind cannot be conceded as consent. Consent is defined in in The

Law Lexicon with Legal Maxims, written by P. Ramanatha Aiyar, Reprint Edition 1992 the word `consent' is defined as "**an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side**". In Black's Law Dictionary Seventh Edition it is defined as "agreement, approval or permission as to some act or purpose, esp. given voluntarily by a competent person". Moreover in Oxford Advanced Leaner's Dictionary it is defined as "**permission to do, especially given by in authority"** The reliance placed by the learned counsel in a decision reported in Deelip Singh alias Dilip Kumar V. State of Bihar ((2005)1 SCC 88) is not applicable in the facts and circumstances of the case. Hence, this Court is of the view that the findings entered by the trial court are based on evidence and it requires no interference by this Court. The conviction entered against the appellant under section 376 IPC is confirmed, accordingly.

8. With regard to the sentence awarded against the appellant, considering the fact that PW1 was aged 19 years and Second year B.A. Degree student and that she voluntarily accompanied the appellant to Ootty instead of Love Home, Thodupuzha as directed by PW3 and also the fact that she did not object to having been introduced as the wife of

the appellant, this Court is of the view that rigorous imprisonment for five years will meet the ends of justice. Hence, the appellant is sentenced to undergo rigorous imprisonment for five years under section 376 IPC.

9.The sentence awarded against the appellant is modified as above and the appeal is dismissed.

K. Thankappan,
Judge.

K. Thankappan,J.

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Judgment
2-2-2007